EXHIBIT B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS
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LEXINGTON INSURANCE COMPANY and
NATIONAL UNION FIRE INSURANCE COMPANY
OF PITTSBURGH, PA,

Plaintiffs,

-against- 04-11109 (RGS)

VIRGINIA SURETY COMPANY,

Defendant.
-----------------------------------x

July 31, 2006

10:10 a.m.

Deposition of CHARLES J. MESSERY, pursuant to notice, at the offices of Mintz, Levin, Cohn, Ferris Glovsky and Popeo, PC, 666 Third Avenue, New York, New York, before Gail F. Schorr, a Certified Shorthand Reporter, Certified Realtime Reporter and Notary Public within and for the State of New York.

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companies?

A. Yes.

Q. How long were you at Lexington Insurance Company?

A. Two years.

Q. And were you based in New York?

A. Yes.

Q. There's reference in some of the documents to Risk Specialists of New York?

A. Yes, Risk Specialist Company, it's a wholly owned subsidiary of Lexington Insurance Company. It's really the wholesale broker for Lexington Insurance Company.

Q. I see. So if somebody --

A. An MGA almost.

Q. So if somebody wants to place a policy with Lexington they would approach Risk Specialists of New York?

A. Yes.

Q. And technically you work for

CHARLES J. MESSERY

for retailers around in the New York/New Jersey area.

Q. So --

A. And also retailers and wholesalers.

Q. Was there an existing book of business that you managed?

A. A small existing book of business. I was really put there to grow the book of business.

Q. So as the other brokers in this area would go to Risk Specialists?

A. Yes.

Q. Is Risk Specialists a wholesale broker?

A. No, it's technically I think it's an MGA.

Q. A managing general agent?

A. It's either an MGA or a wholesale broker for Lexington, strictly just for Lexington Insurance Company.

MR. FRIM: Can we go off the record for a second.

National Union?

A. Now you're saying it, so I'll follow you.

MR. FRIM: Just to clarify, that's National Union Fire Insurance Company of Pittsburgh. There are some other National Unions.

Q. So if we refer today to either National Union or NUFIC, we're referring to National Union Fire Insurance Company of Pittsburgh.

A. That's fine. You got it.

Q. In some earlier documents provided to us by your counsel, you were referred to as a former underwriter, former Lexington underwriter, negotiated the original NCOPO policies and oversaw issuance of all other related policies. Is that a fair description of what you did with respect to the NCOPO?

A. Yes.

Q. And when we refer to NCOPO, what does that mean to you?

CHARLES J. MESSERY

A. National Coalition of Property Owners.

Q. Prior to joining Risk Specialists had you had any involvement with NCOPO?

A. No.

Q. Had you had any involvement with a company called AIMCO?

A. No.

Q. And what is the National Coalition of Property Owners as you understand it?

A. It's a group of similar type insureds with no financial relationship.

Q. And what was the purpose of that group, do you know?

A. Is to buy insurance collectively.

Q. Is there some advantage in companies buying collectively?

A. Sure, it's usually because of -- because it's a greater pot of insureds in the same operations, they usually get a cheaper, a cheaper price

to buy collectively.

Q. So a number of different companies in a particular industry?

A. Yes.

Q. Can come together and buy policies together?

A. Yes. You know, there's always a homogeneous group of insurers come together and buy insurance collectively.

Q. Is that something that's relatively common in the insurance industry?

A. Sure.

Q. Is that referred to sometimes as a program?

A. Usually, yes.

Q. So there might be a program for nursing homes, a program for real estate companies, a program for something else?

A. Yes.

Q. And in the case of the NCOPO program, and I may just refer to it as

CHARLES J. MESSERY

request that was attached?

A. No.

Q. All right. Have you done anything in connection with appearing at this deposition in terms of looking for documents?

A. No.

Q. When you left Risk Specialists did you take any documents with you?

A. No.

Q. So you would not personally have any documents dealing with the --

A. No.

Q. -- NCOPO?

A. No.

Q. When you were at Risk Services, did you maintain files concerning the NUFIC and Lexington's participation in the NPS program?

A. Yes.

Q. What types of files did you have there?

A. The underwriting file.

CHARLES J. MESSERY

Q. What is an underwriting file?

A. It has the submission, correspondence, the policy and endorsements.

Q. Everything is all in one file?

A. One file or a couple of files.

Q. Are these electronic files?

A. No.

Q. Or are they paper files?

A. No, at that day it was all paper files.

Q. In response to some of our document requests there was an assertion that Mr. Messery had a file but the file has since been lost. Are you familiar with that?

A. That's what they told me.

Q. Do you know what the file was that's been lost?

A. No, I don't know exactly which one.

CHARLES J. MESSERY

structure of the previous program was?

A. No.

Q. Do you know who the participating insurers were?

A. Yes, only from loss runs.

Q. And who were the participating insurers?

A. I think it was Reliance was one of the years and Chicago Insurance Company was another year.

Q. Do you remember what types of policies they were issuing, in terms of limits?

A. I don't know. It doesn't say on the loss runs.

Q. How did you first become involved with the National Coalition of Property Owners program?

A. A submission was sent to our office.

Q. By whom?

A. Dowd, Rob Dowd & Associates.

Q. Do you know Mr. Dowd?

A. Yes.

CHARLES J. MESSERY

different people, I don't --

Q. And that was because the size of the program was beyond your ability to write?

A. Yes, authority. It was above our authority.

Q. And what were you asked when this submission was given to you by Mr. Dowd, what did Mr. Dowd ask Lexington to do?

A. To put together a primary policy.

Q. Did he tell you what type of limits they wanted?

A. A million.

Q. Did he want a million dollars of first dollar coverage?

A. Yes.

Q. So the initial plan that came to you was we'd like a million dollar policy?

A. Yes, a million dollar primary policy.

Q. Did you have discussions

CHARLES J. MESSERY

with him as to --

A. We told him absolutely no way.

Q. Before you get to that, did you have discussions with him about -- in other words, did he explain to you that this is part of the program?

A. No.

Q. Was it for a single insured or was it for the program at that point?

A. I thought it was a single insured.

Q. Do you know who the single insured was?

A. I don't.

Q. Do you think it might have been at AIMCO?

A. I'm not really certain.

Q. But your understanding now is that --

A. Yes.

Q. Is that you believed it was a single insured that they were seeking

CHARLES J. MESSERY

dollar policy.

Q. And was that something you knew right off the bat --

A. Yes, because --

Q. Let me finish. Was that something you knew as soon as they made the request or did you have to evaluate it and go to your management?

A. No, I knew it as soon as they made the request.

Q. Why is that?

A. Lexington doesn't write first dollar real estate business.

Q. So as a matter of policy they wouldn't do it?

A. Yes.

Q. Why is that?

A. There's too much frequency and they want to be on an excess layer to be excess of the burn layer they call it. The burn layer is the frequency piece of it, so you want to choose an attachment point that is high enough you're not going to be hit on

every slip and fall losses, you're there for catastrophic losses.

Q. Why is that?

A. You can't make money off of it.

Q. So the idea was if we have first dollar coverage we're going to have to defend and handle every slip and fall claim?

A. Yes. You'd never be able to collect enough premium to pay out your losses.

Q. And so how did you in this case deal with that?

A. So we told them that the only way we'd look at the account is if we were excess of a $250,000 SIR.

Q. What is an SIR?

A. Self insured retention.

Q. And what does that mean?

A. It means that the insured's responsible for the first $250,000 and then the insurance carrier sits excess of the SIR.

CHARLES J. MESSERY

Q. Was the policy -- what was Mr. Dowd's reaction when you gave him that news?

A. Push-back that they said they wouldn't be able to sell it.

Q. What happened next?

A. Then at that period of time is when we -- brokers changed hands and it went from Rob Dowd to Dennis Rielly and First Capital.

Q. Same account basically, same insured?

A. Same insured but they resubmitted a whole new submission.

Q. Through First Capital?

A. Through First Capital, yes.

Q. And who was First Capital?

A. Al Moss and Dennis Rielly and Joe Davis.

Q. And what is First Capital?

A. They're a wholesale broker.

Q. What's a wholesale broker?

A. A wholesale broker is -- gets business from a retailer and then

seeking a million dollar policy first dollar coverage?

A. Yes.

Q. You informed Mr. Dowd you could not do that because Lexington did not want to --

A. Right.

Q. -- have what you referred to as the burn layer?

A. Yes.

Q. Lexington wanted to avoid having exposure to frequent small losses?

A. Yes.

Q. Is that fair to say?

A. That's fair.

Q. Lexington wanted to write a policy that had an attachment point that would limit its exposure to what might be called catastrophic losses?

A. Yes.

Q. Why was $250,000 the attachment point?

A. At that time that's where we

CHARLES J. MESSERY

felt that, you know -- all the slip and falls would definitely be under that and then the only thing that would be under that would be something catastrophic we felt.

Q. The policy they were seeking from you was a primary CGL or commercial general liability insurance policy?

A. Yes.

Q. Does Lexington write primary commercial general liability policies?

A. Yes.

Q. Is it correct that your response was we can't write a primary CGL policy with first dollar coverage but we will do so if -- we will issue a primary CGL policy excess of a self-insured retention?

A. It was more like an excess policy not a primary policy.

Q. What's the difference between an excess policy and a primary policy?

A. An excess policy is over a

CHARLES J. MESSERY

primary policy where a primary policy with an SIR is a primary policy.

Q. I'm sorry?

A. A primary policy with an SIR is still a primary policy.

Q. But what's the distinction?

A. Usually on an excess policy there's a primary policy that gets triggered.

Q. And is it typical in an excess policy for the excess policy to identify the primary policy?

A. Yes.

Q. And is there a difference between --

A. Sometimes though, sometimes, sometimes you do and sometimes you don't. On an umbrella policy you always schedule the underlying and sometimes on a stand alone excess policy you don't necessarily schedule the primary policy. You schedule an excess.

Q. Would an umbrella policy

sitting over the stand alone you'd be expected to identify the primary?

A. Yes, definitely.

Q. So if you had a -- in this case did you have umbrella coverage above the Lexington piece?

A. I don't know.

Q. Based on your understanding of the way the industry works, would you expect --

A. Yes.

Q. -- the umbrella carrier to identify all the underlying insurance policies?

A. Oh, yes, sure.

Q. In any event, they were seeking a primary policy and you ended up writing a policy that was excess of an SIR?

A. Yes.

Q. It was not excess of any specific insurance policy, was it?

A. We knew it was going to be excess of an insurance policy. We

CHARLES J. MESSERY

Q. And how were defense costs handled under that retention?

A. Inside the SIR.

Q. And what does that mean?

A. That means that the defense costs and indemnity erodes the SIR.

Q. So if an insured spent $50,000 in defense costs that would apply against the $250,000?

A. Yes.

Q. If an insured did not insure the retention and spent $250,000 on legal fees, what would happen?

A. Say that again.

Q. Assume that the insured was paying out of pocket for defense costs.

A. There's no policy.

Q. No policy.

A. Okay.

Q. And they spent $250,000 in defense costs?

A. Yes.

Q. On a major claim, what would happen at that point?

CHARLES J. MESSERY

A. To tell you the truth, I'm -- you have to read that particular endorsement, but depending how it read, if it was indemnity and defense, that I don't know what triggers that erosion for the excess policy to trigger if it's actually paid expenses. I don't know if reserves count. So I don't know if you're talking about paying reserves.

Q. Let's assume they paid $250,000.

A. If they paid $250,000 then that SIR would be eroded and then the excess policy would have kicked in.

Q. In that instance, Lexington's intent in that instance is to make sure that there's a $250,000 buffer essentially between it and the losses?

A. Right. I think this case was a little bit different because we didn't look at it like a true SIR that you would typically look at it. We

looked at it we were there sitting excess of an insurance policy. So our policy would not be triggered until that primary policy was exhausted.

Q. Right. And why didn't you write an excess insurance policy?

A. They wouldn't let us. We tried to and they said they wouldn't be able to sell it to the different contracts that they have, I guess lenders, that, you know, they had to show a full million dollar limit, they couldn't -- they had to show a primary policy.

Q. And so you used a primary insurance policy?

A. Yes.

Q. And that was because they, in order to sell the coverage to their insureds, had to have a primary policy form?

A. In order for us?

Q. In order for First Capital to sell the policy to their insureds?

A. Yes.

Q. And by definition, in order for Lexington to sell the policy you had to issue it in a primary policy form?

A. You got it.

Q. So when the First Capital went to its client, NPS, who then went to their client, these property owners, what they were presented with was a program which involved a $250,000 self-insured retention?

A. Yes.

Q. And a primary insurance policy form, form issued by Lexington?

A. I don't know how he presented it. I don't know how he did it. I just know how I issued it.

Q. But it was clear to you that they would not accept an excess insurance policy?

A. Yes, very clear.

Q. So the only way you could sell the policy was to issue a primary

CHARLES J. MESSERY

insurance policy?

A. Yes, yes.

MR. FRIM: Objection. You meant form, correct?

Q. Form, yes. And you understood the difference between a primary insurance form and an excess insurance form?

A. Yes.

Q. Is there a difference between a primary policy written over an SIR and an excess policy written over a specified underlying insurance policy?

MR. FRIM: Objection.

A. Say that again.

Q. Is there a difference between a primary insurance policy with an SIR and an excess insurance policy written over a specified underlying policy?

A. Yes. I mean the difference meaning they use different forms or is the coverage different?

determines how those defense costs would apply?

A. No.

MR. FRIM: Objection. I just want to make sure. Can you clarify whether we're talking about the whole universe of policies he dealt with or just with the NCOPO policies? It's not clear to me.

Q. I'm referring to the NCOPO policies. Do you remember there being a time when you used a different policy form in the NCOPO program, where you changed policy forms?

A. Yes, sure I do.

Q. And when was that?

A. I don't know exactly how many policies into it, but we went to a -- it was a different policy form and it was on Lexington paper. I just don't -- I don't remember what the split was.

Q. Can you tell me why that change was made?

CHARLES J. MESSERY

A. The market turned and we had written the policy for awhile and it continued to write the program. We were starting to try and change it to the way we originally wanted to do it.

Q. You said the market had turned, it was -- it was a more difficult market?

A. It was a more difficult market, you know, the losses had developed from years past, and Lexington's underwriting guidelines -- I think to tell the truth I'm probably speculating right now. I know that there came a point where home office said, enough is enough, we're issuing it the way we want it, the way we intended to issue it all along. I don't know what their thought process was and why they, you know --

Q. You think part of it was because the market had changed in what, because then Lexington had more leverage with the policy?

CHARLES J. MESSERY

(Messery Exhibit 5 for identification, copies of a memo dated 05/20/02.)

Q. Mr. Messery, if you could just read this exhibit and just tell me when you're done.

A. Sure.

Q. It looks like copies of the same, some have notations on them.

A. Okay.

Q. Are you aware that National Union cancelled the NCOPO program sometime in 2002?

A. Yes.

Q. And do you remember the circumstances in which that cancellation occurred?

A. Yes.

Q. Would you describe them for me, please.

A. That's when we found out that premium payment had not been collected or paid by First Capital, and I think it's around this time that -- I

CHARLES J. MESSERY

think it's around this time when everything got blown up by NPS.

Q. Did you have discussions with First Capital about the nonpayment of premium?

A. Yes.

Q. Who did you talk to?

A. Dennis Rielly.

Q. Could you tell me as best you remember the substance of your discussions with Mr. Rielly.

A. I mean toward the end of the program they were delinquent every month on payments of premium so we had threatened to cancel the program many times and had finally come to the end.

Q. What was Mr. Rielly -- did Mr. Rielly explain the reason for nonpayment?

A. No. He just said he would try and get the money.

Q. Did he explain that the money had not come in from NPS?

A. No. Oh, yes, sure, I think

CHARLES J. MESSERY

policy or under this form that says that we don't pay until a primary insurance policy's liability limits are paid out?

A. Well --

MR. FRIM: Objection. He doesn't have the whole policy in front of him.

Q. We could have him read the whole thing. Based on your understanding, tell me if you don't remember --

A. In every policy there's another insurance clause so depending how the other insurance clause read.

Q. Why don't we turn to the other insurance clause just to go through that. Which I believe is on -- I'll find it for you. Turn to Page ME 00461. If you look down, it says paragraph 4, other insurance. This is the other insurance clause you refer to?

A. Yes.

Q. It says, "If other valid and

CHARLES J. MESSERY

exactly what they were. That was kind of like toward the end of my tenure there.

Q. Is there anything under subsection b here, one, two and three that you believe based on what you do know would apply to the VSC policies in order to make this policy excess over it?

A. One, two and three?

Q. Yes.

A. No.

Q. So if we go back to subparagraph (a) it says, "In the event b doesn't apply, we will share with all that other insurance by the method described in c below." Why don't we go down to c: "If all of the other insurance permits contribution by equal shares we will follow this method also." Do you know what that means?

A. I guess it's just talking about they'll do it in equal shares.

Q. So as it says in the next

Lexington as to why under this program you were going to be switching to a different form?

A. The reason why?

Q. Yes.

A. I don't remember exactly the exact reason why. I could just say like I said from the beginning, was, you know, always our intent to use this form.

Q. But you didn't use it for some period of the program?

A. Yes.

Q. So as far as the -- certainly as far as the policyholders were concerned, they had a primary CGL policy with $250,000 SIR?

A. On the original policy?

Q. On the original policy?

A. Right.

Q. And then at some later date you used something called a stand alone excess liability policy; is that right?

A. Yes.

policy forms.

Q. And this one was properly coded as a primary policy?

A. Yes.

Q. Then we have premium, that's the amount that you charged?

A. Yes.

Q. 8 percent went to First Capital?

A. Yes.

Q. And the $2 million aggregate limit?

A. Yes.

Q. And then down below you have circled monoline policies and other policies not listed. What does that refer to?

A. I don't know. I guess it's policies, I don't know.

Q. Go to the next page, you've circled under 19, you circled A rate. What does that refer to?

A. A rate, that's how you rated. It was -- A rate in ISO is --

CHARLES J. MESSERY

sell a stand alone excess policy with an SIR of 250 to their policyholders?

A. I guess it was not just sell them, but they, you know, for different -- people have lenders and different requirements. So it was a combination of things.

Q. Whatever reason, it wouldn't work for what they were trying to put together?

A. It wouldn't work, wouldn't fit, yes.

Q. So to accommodate that you used a primary policy form, a primary commercial general liability policy form?

A. Yes.

Q. And then at some point in the future when the market had changed and you decided to use the form that was a better statement of your intent by using the true excess form, the stand alone excess form?

A. It was the form that we

originally wanted to use.

Q. But you couldn't use?

A. We couldn't use. We didn't use.

Q. You didn't use. But you originally wanted to but you couldn't so you had to use the primary CGL form?

A. Yes.

Q. But at some later date you felt you had the ability to enforce your intent to use the stand alone excess; is that right?

A. Yes, that's correct.

MR. BLUTE: I have no further questions. Thank you.

(Time noted: 1:08 p.m.)

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CHARLES J. MESSERY

Subscribed and sworn to before me

this ______ day of ___________, 2006.

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